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THE EUROPEAN COURT OF HUMAN RIGHTS HOLDS DELFEEE LIABLE FOR ANONYMOUS DEFAMATION

By **Giancarlo Frosio** on October 25, 2013 at 4:26 pm

A recent decision of the European Court of Human Rights (ECHR) may expand considerably web portals' liability for hosting users' comments. In [Delfi AS v. Estonia](#), the ECHR has found Delfi, one of the largest news portals on the Internet in Estonia, liable for anonymous defamation.

Delfi published an article that mentioned in its title that SLK, a company providing a public ferry transportation between the mainland and some islands, "Destroyed Planned Ice Roads," which are public roads over the frozen sea. Although the article was not itself defamatory, it attracted 185 comments including personal threats and offensive language directed against a member of the advisory board of SLK. The target SLK board member was Jewish and several comments had a marked, and in some instances especially ignominious, anti-Semitic flare.

Delfi had in place a notice-and-take-down policy. Under this policy, (i) any reader could mark a comment as insulting, mocking or inciting hatred on the Internet, (ii) a system of automatic deletion of comments including obscene words was in place, and (iii) a victim of defamatory comments could directly notify Delfi.

Upon SLK's request for removal of the comments, Delfi promptly removed the comments under its notice-and-take-down obligations. However, Delfi refused SLK's additional claim for non-pecuniary damages.

After a long-lasting legal battle in Estonian courts, the Supreme Court upheld previous judgments and reiterated that Delfi is a provider of content services. As such, Delfi governs the content that is stored and should be distinguished from an information service provider, falling under the e-Commerce Directive and its Estonian national implementation, which has neither knowledge of nor control over information which is transmitted or stored. By integrating the comment environment into its news portal and inviting users to post comments, Delfi could decide which comments to publish or not. The fact that Delfi did not use this capability did not mean that it had no control over the publishing of comments. In the Supreme Court's view, because Delfi had a legal obligation to avoid causing damage to other persons, Delfi should have prevented unlawful comments from being published. Finally, the Estonian Supreme Court noted that both Delfi and the authors of the comments could be considered publishers of the comments. Therefore, the defamed party was free to choose against whom to bring the lawsuit.

Delfi finally sought redress from the ECHR. The ECHR was asked to determine whether the domestic judicial authorities' decision to hold the Internet portal liable was an unjustified and disproportionate restriction on Delfi's freedom of expression, according to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("Convention"). The ECHR was asked to strike a balance between freedom of

expression under Article 10 of the Convention and the preservation of personality rights of third persons under Article 8 of the same Convention.

In striking this balance, the ECHR considered several factors. First, the Court examined the context of the comments. In this respect, the Court noted that, although the article itself was a balanced one, Delfi could have realized that the article might have caused negative reactions because readers and commenters had a great deal of interest in the matter, as shown by the above average number of comments posted on the article. In addition, the Court noted that the general negative reputation of comments on the Delfi news portal should have induced Delfi to exercise special caution. The ECHR seems to endorse a principle by which, if there is “a higher-than-average risk that the negative comments could go beyond the boundaries of acceptable criticism and reach the level of gratuitous insult or hate speech,” an Internet news portal is expected to exercise a special degree of caution in order to avoid being held liable for the infringement of other persons’ reputations.

Second, the ECHR considered the measures applied by Delfi in order to prevent or remove defamatory comments. Due to the notice-and-take-down policy in place, the Court could not find that Delfi had wholly neglected its duty to avoid causing harm to third parties’ reputations, but it nevertheless held the measures Delfi applied were insufficient. As the ECHR noted, the automatic word-based filter Delfi used was relatively easy to circumvent and as such insufficient for preventing harm to third persons. Similarly, the notice-and-take-down system did not ensure sufficient protection to third persons. In the ECHR’s view, Delfi was in a position to take technical or manual measures to prevent defamatory statements from being made public. Delfi exercised a substantial degree of control over the comments and did not make use of the full extent of the control at its disposal.

Third, the ECHR examined the liability of the actual authors of the comments as an alternative to Delfi’s liability. The ECHR highlighted the difficulties for an individual to establish the identity of the persons to be sued and considered it disproportionate, in light of Article 8 of the Convention, to put the onus of identifying the authors of the infringing comments on the injured person. The ECHR further justified this conclusion by noting that it was Delfi’s choice to allow comments of unregistered users. In sum, the ECHR concluded that Internet news portals assume a certain responsibility for allowing comments from non-registered users.

In close connection to this assumption, the ECHR looked at the conundrum represented by the potential advantage of anonymity in exercising freedom of expression, the ease of disclosure of information over the Internet and the difficulties for potentially injured parties to detect defamatory statements and remove them. In this regard, the ECHR concluded that “shifting the defamed person’s risk to obtain redress for defamation proceedings to the media company, usually in a better financial position than the defamer, [is] not such a disproportionate interference with the media company’s right to freedom of expression.”

Fourth, in order to determine the proportionality of the interference with Delfi’s freedom of expression, the ECHR emphasized the commercial and professional nature of Delfi’s activities. Redeploying an argument previously raised by domestic courts, the ECHR noted that Delfi had an economic interest in the comments, whose number had an effect on the portal’s traffic and thus on Delfi’s revenues from advertising. The ECHR found this argument relevant in weighing the disproportionality of the interference against freedom of expression. The ECHR seems to infer that commercial motivation may induce Internet portals to allow the maximum number of unchecked anonymous comments. If this is the case, the ECHR reasoned, Internet news portals should be held liable for this business decision.

This decision of the ECHR attempts to strike a balance between intermediaries’ liability, freedom of expression and personality rights. The ECHR tackled this conundrum by delineating a narrowly construed scenario in which liability supposedly does not interfere with freedom of expression. In a situation of higher-than-average risk of defamation or hate speech, if comments from non-registered users are allowed, a professionally managed and commercially based Internet news portal should exercise the full extent of control at its disposal – and must go beyond automatic filtering or ex post notice-and-take-down procedures – to avoid liability. Once again, liability of intermediaries seems to be on the rise and the role of intermediaries is dangerously blurred with that of entities obligated to police the net for infringing activities.

Focus Areas: Intermediary Liability

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